Peter Yip Shou Shan v George Kent (M) Bhd & Ors

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO S5–24–1540 OF 1990
ABDUL AZIZ J
25 JANUARY 2002

Civil Procedure *— Interpleader summons — Costs — Application properly brought and summarily disposed of — Whether applicant of interpleader should pay costs or be paid costs*

George Kent (M) Bhd ('George Kent') had issued two letters dated 1 August 1988 and 22 November 1988 addressed to Interconstruction (M) Sdn Bhd ('Interconstruction') containing an agreement between them. George Kent entrusted the two letters to the applicant, their solicitors, who wrote to Messrs Skrine ('Skrine'), Interconstruction's solicitors to give his 'irrevocable solicitor's undertaking' that he would release the letters to them on their request, provided they confirmed that Interconstruction had instructed them that the agreement had been breached. Skrine, on 17 November 1990, wrote to the applicant that Interconstruction had instructed them that George Kent was in breach of the agreement and asked them to release the letters. When George Kent instructed the applicant not to release the letters, Interconstruction threatened legal action against the applicant. The applicant then filed an interpleader summons to have the rights of both parties determined. Interconstruction, in their affidavit, maintained that the applicant's undertaking was clear and unequivocal, asked that the interpleader summons be dismissed and that the applicant and George Kent pay the costs of the proceedings. At the hearing before the senior assistant registrar ('the SAR'), Interconstruction raised the preliminary point that the case was not suitable for interpleader. The SAR ordered the applicant to release the letters and pay the costs of the proceedings personally. The applicant appealed. Counsel for the applicant argued that, inter alia, he had taken out the interpleader in good faith and therefore he should be paid costs. Counsel for George Kent stated that the applicant should not have taken out the interpleader summons and thus should bear the costs.

Held, allowing the appeal and setting aside the order of the SAR:

(1) An applicant for relief by way of an interpleader, in a proper application, should, in principle, not be liable to pay costs but should instead be paid his costs by either of the claimants, because it was their conflicting claims that had compelled him to seek the relief. The claimant liable to pay the costs of the applicant should be the claimant who failed in the claim, who should also bear the costs of the successful claimant (see p 150D–E).

(2) If the SAR had found the application not to have been properly brought, the proper order should have been to dismiss it and to make the applicant pay costs. It was only when the application was dismissed that the applicant should be liable to pay costs. By ordering that the letters be released to Interconstruction, the court assumed that the SAR had found the application to have been properly brought and had proceeded in a summary way, under O 17 r 5(2) of the Rules of the High Court 1980, to 'determine the question at issue between the claimants', which she did in favour of Interconstruction. It was not just that the applicant pay the costs of the claimants. George Kent should pay the costs of Interconstruction and of the applicant (see p 150E–G).

[Bahasa Malaysia summary

George Kent (M) Bhd ('George Kent') telah mengeluarkan dua pucuk surat bertarikh 1 April 1988 dan 22 November 1988 dialamatkan kepada Interconstruction (M) Sdn Bhd ('Interconstruction') yang mengandungi satu perjanjian antara mereka. George Kent mengamanahkan kedua-dua pucuk surat tersebut kepada pemohon, peguamcara mereka, yang telah menulis kepada Tetuan Skrine ('Skrine'), peguamcara Interconstruction untuk memberikan 'irrevocable solicitor's undertaking' beliau bahawa beliau akan melepaskan surat-surat tersebut kepada mereka atas permintaan mereka, dengan syarat mereka menunjukkan bahawa Interconstruction telah mengarahkan mereka bahawa perjanjian tersebut telah dilanggar. Skrine, pada 17 November 1990, telah menulis kepada pemohon di mana Interconstruction telah mengarahkan mereka bahawa George Kent telah melanggar perjanjian tersebut dan meminta agar mereka melepaskan surat-surat tersebut. Apabila George Kent mengarahkan pemohon untuk tidak melepaskan surat-surat tersebut, Interconstruction mengugut akan mengambil tindakan undang-undang terhadap pemohon. Pemohon kemudian telah memfailkan satu saman interplider bagi menentukan hak-hak kedua-dua pihak. Interconstruction, dalam afidavit mereka, menegaskan bahawa akujanji pemohon adalah jelas dan tidak taksa, memohon agar saman interplider tersebut ditolak dan agar pemohon dan George Kent membayar kos prosiding. Semasa perbicaraan di hadapan penolong kanan pendaftar ('PKP'), Interconstruction telah menimbulkan satu perkara permulaan bahawa kes tersebut adalah tidak sesuai untuk interplider. PKP telah memerintahkan pemohon melepaskan surat-surat tersebut dan membayar kos untuk prosiding secara persendirian. Pemohon membuat rayuan. Peguam bagi pihak pemohon menghujahkan antara lain, bahawa beliau telah mengambil interplider dengan niat baik dan oleh itu sepatutnya dibayar kos. Peguam bagi pihak George Kent menyatakan bahawa pemohon tidak sepatutnya mengambil saman interplider dan oleh itu patut menanggung kos tersebut.

Diputuskan, membenarkan rayuan tersebut dan mengetepikan perintah PKP tersebut: A

(1) Seorang pemohon untuk relif melalui satu interplider, dalam permohonan yang betul, hendaklah, secara prinsipnya, tidak bertanggungjawab untuk membayar kos tetapi hendaklah sebaliknya dibayar kos beliau melalui salah satu pihak menuntut, kerana ia adalah tuntutan bercanggah mereka yang telah menyebabkan beliau memohon relif tersebut. Pihak menuntut yang bertanggungjawab untuk membayar kos pemohon adalah pihak menuntut yang telah gagal dalam tuntutan, yang sepatutnya juga menanggung kos pihak menuntut yang berjaya (lihat ms 150D–E). B C

(2) Sekiranya PKP mendapati permohonan tersebut tidak dikemukakan dengan betul, perintah yang betul adalah untuk menolaknya dan untuk membuat pemohon membayar kos. Hanya apabila permohonan tersebut ditolak maka pemohon patut bertanggungjawab membayar kos. Dengan memerintahkan surat-surat tersebut dilepaskan kepada Interconstruction, mahkamah berandaian bahawa PKP telah mendapati permohonan tersebut telah dikemukakan dengan betul dan telah meneruskan secara terus, di bawah A 17 k 5(2) Kaedah-Kaedah Mahkamah Tinggi 1980, untuk 'determine the question at issue between the claimants', yang beliau lakukan menyebelahi Interconstruction. Adalah tidak adil untuk pemohon membayar kos kedua-dua pihak menuntut. George Kent sepatutnya membayar kos Interconstruction dan pemohon (lihat ms 150E–G).] D E

Notes F

For cases on interpleader summons generally, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 3088–3104.

Legislation referred to

Rules of the High Court 1980 O 17 rr 5(2), 18 G

PK Chong (*Peter Yip & Yong*) for the applicant.
HY Lee (*PM Tan & Co*) for the first claimant.
Beldan Premaraj (*Skrine*) for the second claimant.

Abdul Aziz J: In this case, George Kent (M) Bhd ('George Kent') had issued two letters dated 1 August 1988 and 22 November 1988 addressed to Interconstruction (M) Sdn Bhd ('Interconstruction'). The letters constituted or contained an agreement between, inter alia, George Kent and Interconstruction. George Kent entrusted the two letters to their solicitors, the applicant. The applicant wrote to Messrs Skrine ('Skrine'), solicitors for Interconstruction, to give his 'irrevocable solicitor's undertaking' that he would release the letters to them on their request, provided they confirmed that Interconstruction had instructed them that the agreement had been breached. H I

A On 17 November 1990, Skrine wrote to the applicant to say that Interconstruction had instructed them that George Kent were in breach of the agreement and to ask for the release of the two letters.

George Kent instructed the applicant not to release the two letters. Interconstruction threatened legal action against the applicant if he refused B to release the two letters. So the applicant filed the interpleader summons in this case to summon George Kent and Interconstruction to court to have their rights and claims determined.

Interconstruction filed an affidavit in reply to the applicant's affidavit in support of his application, in which, inter alia, they maintained that the applicant's undertaking was clear and unequivocal and should be C performed, and they therefore asked that the interpleader summons be dismissed and that the applicant and George Kent pay the costs of the proceedings. It is clear that Interconstruction's stand in the affidavit was that the applicant had a clear and unequivocal duty to deliver the letters to them and should have done so instead of seeking relief by way of an D interpleader application, which application was therefore improper and should be dismissed with costs to be borne by the applicant and George Kent.

George Kent's affidavit in reply gave reasons why the letters should not be released to Interconstruction and asked that they be returned to them and that the costs be paid by the applicant or by Interconstruction. In other E words, unlike Interconstruction, George Kent was asking the court to proceed to determine the dispute between them and Interconstruction about the letters that was brought by the interpleader summons and to decide the dispute in their favour.

At the hearing before the learned senior assistant registrar ('the SAR') F on 25 July 1991, consistent with Interconstruction's stand in their affidavit, counsel for Interconstruction raised the preliminary point that the case was not suitable for interpleader because there was a clear duty on the part of the applicant to deliver the letters to Interconstruction. He then proceeded to submit on the merits in case, the preliminary point should fail. If the SAR had considered the preliminary point as valid, the proper decision for her to G make should have been to dismiss the application and to order the applicant to pay costs, at least the costs of Interconstruction. But after hearing submissions on all sides, she ordered the applicant to release the letters to Interconstruction and pay the costs of the proceedings personally. In his submission, consistent with the stand taken in George Kent's affidavit, their counsel had argued against releasing the letters and made certain alternative H suggestions.

George Kent filed an appeal against the decision to release the letters to Interconstruction but later withdrew the appeal.

The applicant appealed against the decision that he pay the costs of the proceedings. Submissions were made on the appeal before NH Chan J I (as he then was), and the parties asked me to decide on the appeal with the guidance of the notes that had been taken of the proceedings before him.

Before NH Chan J, counsel for the applicant argued that he had taken out the interpleader summons in good faith and that the summons was rightly brought. Therefore he should be paid costs and not have to pay costs. Counsel for George Kent took a different stand before NH Chan J from his stand before the SAR. He now said that the applicant should not have taken out the interpleader summons because his duty to return the documents was clear. Therefore, he should bear the costs of the proceedings.

Order 17 r 18 of the Rules of the High Court 1980 (the RHC') provides that '... the court may in or for the purposes of any interpleader proceedings make such order as to costs ... as it thinks just'.

It is said at p 168 of *Mallal's Supreme Court Practice* (2nd Ed) Vol 1, 1983, that 'Where a person holds any money, goods or chattels which he does not claim or is under liability for a debt and he expects to be sued in respect of that money, goods or chattels by two or more persons, that person can protect himself from an action and the costs of such an action by calling on these claimants to interplead, in other words, to claim against one another, so that the court can decide to whom the money, goods or chattels belong ...'. That being the nature of the relief by way of interpleader, an applicant for relief, in a proper application, should, in principle, not be liable to pay costs but should instead be paid his costs by either of the claimants, because it is their conflicting claims that have compelled him to seek the relief. The claimant liable to pay the costs of the applicant should be the claimant who fails in the claim, who should also bear the costs of the successful claimant.

In this case, as I said earlier, if the SAR had found the application not to have been properly brought, the proper order should have been to dismiss it and to make the applicant pay costs. It is only when the application is dismissed that the applicant should be liable to pay costs. By ordering that the letters be released to Interconstruction, I assume that the SAR had found the application to have been properly brought and had proceeded in a summary way, under O 17 r 5(2) of the RHC, to 'determine the question at issue between the claimants', which she did in favour of Interconstruction. So I do not think it just that the applicant pay the costs of the claimants. What would be just is that George Kent pay the costs of Interconstruction and of the applicant.

I do not think it is for me on this appeal to consider whether the SAR was right in presumably finding that the application was proper, because there has been no appeal against that finding. George Kent, who have withdrawn their appeal against the ultimate order of the SAR, could not have appealed against that finding because before the SAR, they did not take the stand that the application had not been properly brought and should have been dismissed. Interconstruction of course did not have reason to appeal in any case because the ultimate decision had been in their favour.

In the result, I allow the appeal and set aside the order of the SAR as to costs, and I order instead that George Kent pay the costs of

Interconstruction and of the applicant. As regards the costs of this appeal, as both George Kent and Interconstruction have resisted this appeal, I order that each pay half the applicant's costs of this appeal.

Appeal allowed and order of the SAR set aside.

Reported by Chew Phye Ken